Supreme Court, U.S.
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No. 96-243

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Must a property owner sell transferable development rights (TDRs) and apply for agency approval of the sale in order to ripen a takings claim under the *Williamson County* final decision requirement when:

a. the regulatory agency has already conclusively determined that no viable use of her parcel of land will be permitted;

b. a TDR transfer will not allow her to make any use of her parcel of land; and

c. the maximum extent of development credits available for transfer via the TDR program are already definite and certain and can be valued by normal appraisal methods?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed April 1, 1996, is reported at 80 F.3d 359 and is reprinted in the Joint Appendix (App.) at 154.

The Ninth Circuit's Order denying petitioner's Petition for Rehearing, filed May 13, 1996, was not reported and is reprinted at App. 165.

The Order of the United States District Court, District of Nevada, Judge Edward C. Reed presiding, dated March 30, 1994, was not reported and is reprinted at App. 150.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the the United States Court of Appeals for the Ninth Circuit, filed April 1, 1996. This Court granted the Petition for Certiorari on October 15, 1996. *Suitum v. Tahoe Regional Planning Agency*, No. 96-243 (Petition for Certiorari granted) (Oct. 15, 1996). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

Pertinent provisions of the Tahoe Regional Planning Agency Code of Ordinances, adopted May 27, 1987, effective July 26, 1987, are set forth in the Joint Appendix at App. 45-85; App. 100-17.

STATEMENT OF THE CASE

Petitioner Bernadine Suitum has been deprived of all economically viable use of her retirement homesite near Lake Tahoe. Compounding this injury, Mrs. Suitum has also been denied access to the federal courts to seek just compensation for the regulatory taking of her property.

A. TRPA Has Denied Mrs. Suitum Any Beneficial Use of Her Retirement Homesite

In 1972, Mrs. Suitum and her late husband purchased a residential lot at 159 Mayhew Circle in the Mill Creek Estates subdivision of Incline Village, Nevada, on which they planned to build their retirement home. First Amended Complaint, App. 14. After a series of personal and financial setbacks, including the illness and death of her husband, Mrs. Suitum was finally able to proceed with her plans in 1989. *Id.* By that time Mrs. Suitum's 18,300 square foot parcel was one of the last remaining undeveloped lots in the subdivision. *Id.* Her property is surrounded on three sides by residential homes similar to the one Mrs. Suitum hoped to build. The fourth side of the property abuts a paved street with a curb and gutter. All utilities necessary for a single-family residence have been extended to her property line. *Id.* Prior to 1989, Mrs. Suitum's subdivision lot was classified as suitable for residential construction.[1]

Respondent Tahoe Regional Planning Agency (TRPA) regulates property in the Lake Tahoe region.[2] Under TRPA's current Regional Plan for the Lake Tahoe Basin (the 1987 Plan) the agency determines the amount and density of construction it will permit on all unbuilt residential lots in the region. Affidavit of Susan E. Scholley in Support of Motion for Summary Judgment (Scholley Aff.), App. 145-46.

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[1] Prior to the 1989 implementation of TRPA's Individual Parcel Evaluation System, the agency established thresholds for impervious land cover using a seven-point scale, ranging from land most suitable for development (Class 7) to land that should remain in its natural condition (Class 1). *See People of the State of California v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1315 (9th Cir. 1985). Mrs. Suitum's property was assigned a rating of six on this seven-point system. First Amended Complaint, App. 14.

[2] TRPA was formed in 1969 by an interstate compact between the States of California and Nevada, ratified by Congress in the 1969 Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969), and amended in 1980, Pub. L. No. 96-51, 94 Stat. 3233; California Government Code § 66801; Nevada Rev. Stat. § 277.200.

In 1989, Mrs. Suitum submitted to TRPA plans to build a home on her subdivision lot. TRPA responded by classifying Mrs. Suitum's property as lying within a "Stream Environment Zone" (SEZ). First Amended Complaint, App. 14-15. According to TRPA's 1987 Plan these zones, which affect a small percentage of property in the Lake Tahoe area, "provide surface water conveyance from upland areas into Lake Tahoe and its tributaries." 1987 Plan, App. 25. The significance of TRPA's classifying Mrs. Suitum's lot as part of a Stream Environment Zone is that "no new land coverage or other permanent land disturbance shall be permitted" on Mrs. Suitum's land. *Id.*, App. 26.[3]

This decision was confirmed by TRPA's assigning Mrs. Suitum's property a rating of zero under the agency's Individual Parcel Evaluation System (IPES). The IPES system, implemented in 1989, assigns numerical scores to undeveloped properties reflecting TRPA's opinion of their suitability for development. *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996) (*Suitum*), reprinted at App. 154. TRPA annually establishes an arbitrary IPES cutoff level; only owners of parcels with scores above the cutoff may apply for building permits. Scholley Aff., App. 145. The cutoff score was initially set at 725, and this level prevailed until 1994 in the county where Mrs. Suitum's lot is located. Affidavit of Lyn Barnett in Support of Motion for Summary Judgment (Barnett Aff.), App. 98. Under the TRPA Code and the 1987 Plan, all construction is forbidden on properties with a zero IPES rating, such as Mrs. Suitum's. First Amended Complaint, App. 15. According to TRPA, the fact that Mrs. Suitum's lot "is surrounded by developed parcels and is serviced by a paved street and utilities is not part of the IPES scoring elements." Opposition to Defendant's Motion for Summary Judgment, Court Record (CR) 68, Exhibit 2 at 14.

Mrs. Suitum appealed the determination that she could not build on her residential lot to TRPA's governing board. First Amended Complaint, App. 15. On November 27, 1990, after a public hearing, the board denied Mrs. Suitum's appeal. *Id.* No further procedures for administrative review are available, and

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[3] *See also* TRPA Code of Ordinances (TRPA Code) § 20.4.B, App. 62.

TRPA's regulations include no provisions for seeking variances, waivers, or other exceptions from final determinations of the board. Order of District Court dated November 23, 1993 (1993 Order), App. 88.

B. The Federal District Court Declined to Reach Mrs. Suitum's Regulatory Takings Claim Because She Had Not Attempted to Sell TRPA's Administrative Credits to a Third Party

On January 28, 1991, Mrs. Suitum filed suit in the United States District Court for the District of Nevada, alleging that TRPA's application of its regulations and ordinances to her property *inter alia* violated her civil rights under the Fifth and Fourteenth Amendments to the United States Constitution and took her property without payment of just compensation.[4]

In an order dated November 23, 1993, the trial judge acknowledged that Mrs. Suitum "may not develop or build on the parcel of land she owns and that no development rights may be transferred *to* the property at issue." 1993 Order, App. 88. However, the court requested additional briefing on TRPA's "transfer of development rights" (TDR) process. *Id.*, App. 89.

1. TRPA's Marketable Credits

As part of its overall restrictions on the use of private residential land, TRPA has created a menagerie of administrative credits that property owners are required to possess in order to build a home on their property. These credits are designated "Residential Allocations," "Residential Development Rights," and "Land Coverage." Scholley Aff., App. 145. Although owners of property situated in a Stream Environment Zone are forbidden from making any use of their land, TRPA has created procedures by which the agency's administrative credits can be distributed to the owners of such parcels who *in theory* may then sell them to the owners of other,

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[4] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 42 U.S.C. § 1983. A First Amended Complaint was filed on September 16, 1992, App. 13.

development-eligible lots.[5] Barnett Aff., App. 96-98. Thus, although Mrs. Suitum has been categorically forbidden from building any structure on her property or making any other use of this small parcel that would involve covering or permanently disturbing the land, she may attempt to market TRPA's administrative credits to other owners who may thereby be allowed to increase the development of their own land. This process is generically--albeit misleadingly--described as "transfer of development."[6]

TRPA's credits are administrative contrivances created wholly at the agency's discretion as part of its comprehensive regime of land use regulation. Each of the three types of credits functions to impose a separate development restriction and is created and obtained by landowners in a different manner.

TRPA distributes 300 "Residential Allocations" annually as a means of limiting the number of residences built in the region each year. Barnett Aff., App. 98. A property owner needs one Allocation for every unit to be built; Allocations which are not used within one year are forfeited. Scholley Aff., App. 145-46. Residential Allocations must be obtained through the county in which one's land is situated. Washoe County, Nevada, the jurisdiction in which the Mill Creek Estates subdivision is located, reserves 6 of its 60 annual Allocations for owners of parcels that TRPA deems ineligible for development. To obtain one of these scarce credits, Mrs. Suitum must enter and win a random drawing--in essence, a lottery. Barnett Aff., App. 99.

"Residential Development Rights" (RDRs) function to limit the total amount of residential development that will ultimately be allowed in the Lake Tahoe region. TRPA automatically distributes one RDR to the owner of each vacant residential parcel under its

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[5] The record contains no evidence that any owner of residential property in a Stream Environment Zone has ever actually consummated a sale of these credits to another residential property owner. No sales were recorded for any of the Residential Allocations distributed to the owners of lots rated below the IPES cutoff in 1993. Scholley Aff., App.147.

[6] *See* 1987 Plan, App. 38; TRPA Code Chap. 34, App. 68.

jurisdiction. Barnett Aff., App. 97. Each RDR authorizes the property owner (assuming the owner also possesses the other required credits) to build one residential unit; multiunit development requires the aggregation of RDRs from the owners of other properties. *Id.*, App. 97-98. There is no one-to-one correspondence between the number of undeveloped parcels in the region and the number of RDRs TRPA may see fit to create. This is illustrated by the fact that owners of parcels situated in a Stream Environment Zone, like Mrs. Suitum, are awarded three arbitrarily created "bonus" RDRs. TRPA's Memorandum Concerning Its Transfer of Development Program, App. 92.

The "Land Coverage" credit serves to limit surface coverage on individual lots and to cap the total amount of land coverage that will be allowed in the region. The credit generally corresponds to that part of the area of a given lot that TRPA will allow to be covered by an impervious surface.[7] For land situated in a Stream Environment Zone, the credit represents 1% of the area of the parcel.[8]

Each of TRPA's three types of development credits can thus be seen as a separate development *restriction* imposed on each owner of undeveloped land in the region.

2. The Transfer Process

Under the TRPA Code, the owner of a parcel situated in a Stream Environment Zone may attempt to market the following credits: a Land Coverage credit equal to 1% of the area of the lot;[9] a Residential Allocation (if one has been obtained by winning the

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[7] TRPA assigns "base coverage" to individuals lots according to their IPES rankings. *See* 1987 Plan, App. 40; TRPA Code § 20.3.A, App. 45.

[8] TRPA Code § 20.3.A, App. 45.

[9] TRPA Code § 20.3.C(2)(c), App. 52.

annual lottery and if a sale can be consummated before the Allocation expires);[10] and four RDRs, including three "bonus" credits.[11]

Although TRPA's approval is not required to establish the credits Mrs. Suitum is entitled to market, or for her to seek to sell the credits, the agency requires its review and approval of the *purchaser* of the credits before any sale can be finalized. *See* Transfer Application, reprinted at App.118.[12] This approval process confirms the eligibility of the buyer to use the purchased credits.[13] Moreover, before any sale will be approved, TRPA requires that the seller execute and record deed restrictions or covenants "permanently removing" the owner's development rights from the lot situated in a Stream Environment Zone.[14] The seller is also required to execute an instrument providing for the perpetual maintenance of her land in its natural state.[15]

Having received briefing on this process, on March 30, 1994, the District Court granted TRPA's motion for summary judgment on the ground that Mrs. Suitum's case was not ripe for adjudication in that she had not attempted to find a buyer for the agency's marketable credits. Order of District Court dated March 30, 1994 (1994 Order), reprinted at App. 150. Citing this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-94 (1985), the trial judge ruled that,

> [a]bsent an application to transfer development, and a final decision on such application, we cannot know

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[10] TRPA Code § 34.3.A, App. 70.

[11] TRPA Code § 34.2.A, App. 69; § 35.2.D(4)(b), App. 112.

[12] This form was Exhibit "ff" to the Barnett Aff, App. 96.

[13] TRPA Code § 20.3.C, App. 52; § 34.2.C-D, App. 69; § 34.3, App. 70-71.

[14] TRPA Code § 20.3.C(7)(a), App.57; § 34.2.B, App. 69; § 34.5.A, B, H, App. 73, 75.

[15] TRPA Code § 20.3.C(7)(a)(ii), (iii), App. 57.

> whether [Mrs. Suitum's] land indeed is unusable. Without a decision as to transfer rights of the property, the economic impact of the challenged regulation and the extent it interferes with [Suitum's] reasonable investment-backed expectation, cannot be assessed.

Id., App. 153.

C. The Ninth Circuit Ruled Mrs. Suitum's Takings Claim Is Not Ripe Because TRPA Had Not Reached a Final Decision as to the Permitted "Uses" of Mrs. Suitum's Property

In a published decision, the Ninth Circuit affirmed the judgment of the trial court. *Suitum*, App. 155. The appellate panel analogized participation in the TDR process to the submission of a modified development plan or variance request, since "the TDR program effects the same purpose: facilitating alternative uses of the property." *Suitum*, App. 161. The court specifically held that "transfer of development rights is a 'use' of SEZ property." *Id.*

The Ninth Circuit held that Mrs. Suitum's case is not ripe for review because

> [w]ithout an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property.
>
> ....
>
> Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. ... Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development ... and thus cannot know the regulations' full economic impact."

Suitum, App. 160-61 (citations and brackets omitted).

The Ninth Circuit acknowledged that there is no uncertainty concerning what credits are available for Mrs. Suitum to attempt to market, *Suitum*, App. 158-59, and it acknowledged that both parties

attempted to introduce evidence of the value of those credits. *Id.*, App. 161-63. Nonetheless, the court below held that Mrs. Suitum's "pursuit" of the sale of TRPA's credits--including an application for TRPA's approval of the purchase of the credits by some third party--was required before the court could determine the extent to which TRPA had deprived Mrs. Suitum of the use of her land. *Id.*, App. 161, 163.

Mrs. Suitum timely filed a petition for rehearing, which was denied on May 13, 1996. Order Denying Rehearing, dated May 13, 1996, reprinted at App. 165. This Court granted certiorari on October 15, 1996.

SUMMARY OF ARGUMENT

The court below found Mrs. Suitum's takings claim to be unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 190-94, because the opportunity to market TRPA's administrative credits was deemed a "use" of Mrs. Suitum's property. *Suitum*, App. 161. This holding conflicts with the opinions of this Court in *Williamson County* and subsequent ripeness cases, in which the only relevant "use" of property has been the owner's ability to build on her land. *E.g., Williamson County*, 473 U.S. at 190; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). This traditional equation of "use" with "development" is especially appropriate in the present case, since Mrs. Suitum's reasonable investment-backed expectation from the time she bought her land was that she would be allowed to build a home on her residential subdivision lot. App. 2.

TRPA's "transfer of development" program does not in fact provide for the transfer of Mrs. Suitum's right to develop her land, which has been totally extinguished by the application of TRPA's regulations. App. 88. Instead, the program amounts to the sale of variances to third parties for cash paid to Mrs. Suitum, whereby the *recipients* (if any can be found) would pay to be allowed to exceed TRPA's restrictions on the development of their own land. To characterize this trilateral variance-for-cash scheme a "use" of Mrs. Suitum's land would deprive that word of all its ordinary meaning.

In order to complete a sale of TRPA's credits under the TDR program in question, the seller must *permanently retire* her own

property from development, executing a deed restriction or comparable covenant forfeiting her right to build in perpetuity. App. 99. This Court has never held that an owner is required to alienate her interest in real property to ripen a claim for a regulatory taking based on the denial of all beneficial use. In addition to the manifest injustice of such a requirement, compliance would deprive Mrs. Suitum of an invalidation remedy under her due process cause of action and invite the argument that participating in the TDR program had rendered her takings claim moot. It would also deprive the public agency of the flexibility to rescind the application of its regulations, thereby limiting its liability to damages for a *temporary* taking.

Although ostensibly limited to a ruling on ripeness, the decision below calls into question the viability of this Court's categorical takings rule in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). If participating in TRPA's TDR program can be deemed a "use" of an owner's property, *Lucas*' categorical rule would be drained of any significance; a landowner would never be deprived of all "use" of her land so long as administrative credits could be contrived that might conceivably be of value to someone, somewhere. Arbitrarily created, marketable coupons cannot be regarded a "use" of property for purposes of either *Williamson County* ripeness or *Lucas'* substantive takings rule.

ARGUMENT

The issue in this case is whether this Court's ripeness doctrine requires a property owner to permanently relinquish the development rights to her land, sell marketable administrative credits to a third party, and apply for agency approval of the sale before her regulatory takings claim will be deemed ripe for adjudication.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has found two categories of regulatory actions to comprise compensable takings regardless of the nature of the public interest they may advance. The first includes regulations that authorize a permanent physical invasion of private property; the second encompasses regulations that "den[y] all economically beneficial or productive use of land." *Lucas v. South Carolina*

Coastal Council, 505 U.S. at 1015. The *Lucas* Court described the latter categorical rule as applying typically to regulations "requiring land to be left in its natural state." *Id.* at 1018.

The clarity of this Court's categorical takings doctrine stands in unfortunate contrast to the confusion and conflict prevailing among the lower federal courts on the question of when a regulatory takings claim is ripe for adjudication. The "final decision" or "finality" ripeness requirement set forth by this Court for an as-applied regulatory takings claim is straightforward: a property owner alleging a taking based on the denial of a development application must obtain "a final, definitive position regarding how [the agency] will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 191. Nevertheless, the application of this principle in the lower courts has left both property owners and regulators "uncertain of [their] rights under the Takings Clause." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 3 (1995). *See also* Daniel R. Mandelker and Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 ZONING & PLANNING L. REP. 49, 53 (1988) ("[s]ome judges have openly admitted their difficulty in determining when 'enough is enough' under this requirement"); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, PROC. INST. PLANNING, ZONING & EMINENT DOMAIN 7-1, 7-38 (1991) ("courts--even within the same circuit--can read the same Supreme Court [ripeness] decisions and conclude that they mean both 'black' and 'white' simultaneously").

The Ninth Circuit has compounded the confusion by its application of the ripeness doctrine in this case. The court below requires Mrs. Suitum to apply for TRPA's approval of the sale of the agency's administrative credits to another landowner in order to ripen her takings claim. This holding severs the ripeness requirement from its conceptual underpinning--which is to allow courts to analyze takings claims in the context of a definitive determination of the extent of development allowed on the owner's property. The Ninth Circuit has taken a doctrine that aims for certainty and rendered it uncertain, as there is no limit to the number of irrelevant and unavailing procedures that a property owner may be forced to utilize

after an agency has commanded her to leave her land forever in its natural state.

I

UNDER *WILLIAMSON COUNTY*, TRPA'S DENIAL OF MRS. SUITUM'S BUILDING PLAN WAS FINAL WHEN THE AGENCY PROHIBITED ANY CONSTRUCTION WHATSOEVER ON HER LAND

In the opinion below, the Ninth Circuit held that the opportunity to market TRPA's administrative credits comprises a "use" of Mrs. Suitum's property, and that she is required to market the agency's credits to a third party and apply for TRPA's approval of the transaction before her takings claim will ripen. *Suitum*, App. 160-61. As authority for this holding the court below cited to the "final decision" requirement first enunciated by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 190-94.

The holding below marks a dangerous misinterpretation of *Williamson County*. If the Ninth Circuit's view were to prevail, landowners like Mrs. Suitum could find their takings claims barred from court for failure to pursue an infinite array of trivial and time-consuming administrative procedures, none of which could restore to the owner any beneficial or productive use of the property in question.

A. In the Context of *Williamson County's* Ripeness Doctrine, "Use" of Property Means Any Economically Feasible Development of the Owner's Land

In *Williamson County*, this Court established that a regulatory takings claim is not ripe for adjudication until the governmental agency has reached "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. Conversely, a property owner does not have a ripe takings claim if she "has not yet obtained a final decision regarding how [she] will be allowed to develop [her] property." *Id.* at 190.

In the proceedings below there was no ambiguity concerning the amount of development that TRPA will allow on Mrs. Suitum's residential lot. The agency's 1987 Plan and Code unequivocally

forbid any "additional land coverage or other permanent land disturbance" on the Mill Creek Estates site.[16] As the District Court acknowledged, Mrs. Suitum "may not develop or build on the parcel of land she owns." 1993 Order, App. 88.

Nevertheless, the trial judge found that, for purposes of the ripeness inquiry, selling TRPA's marketable credits constitutes a "use" of Mrs. Suitum's property, and *Williamson County* bars consideration of her takings claim until such a sale is pursued. *Suitum*, App. 160-61. In affirming this ruling, the Ninth Circuit found that until Mrs. Suitum attempts to market TRPA's credits, the agency will be unable to determine "the *extent of the use*" of her property. *Id.*

This holding conflicts sharply with the language and intent of this Court's ripeness decisions, which have uniformly been concerned with identifying the type and extent of *development* that will be allowed on a plaintiff's real property.

The rule set forth by this Court in *Williamson County* requires a final decision regarding how the property owner will be allowed "***to develop*** its property." 473 U.S. at 190 (emphasis added). In *MacDonald, Sommr & Frates v. Yolo County*, 477 U.S. 340, this Court described the nature of the ripeness inquiry as "an insistence on knowing the nature and extent ***of permitted development***" before adjudicating a takings claim. *Id.* at 351 (emphasis added). A final decision under *MacDonald* is one that leaves no uncertainty concerning "the type and intensity ***of development*** legally permitted on the subject property." *Id.* at 348 (emphasis added). The takings question was found to be unripe in *MacDonald* because under the facts of that case there remained a "possibility that ***some development*** will be permitted." *Id.* at 352 (emphasis added).

The identification of "use" of property with economically feasible development in *Williamson County* and its progeny reflects the fact that this branch of the ripeness doctrine emerged from cases dealing with regulatory restrictions on land development, and has meaningful application only in that context. In *Williamson County*, a developer brought a regulatory takings claim based on the disapproval of a preliminary development plat. 473 U.S. at 182.

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[16] *See* TRPA Code § 20.4, App. 62.

The disapproval was found not to be a final decision because the developer could have sought a variance *which might have permitted further building activity* on some or all of the property in question. 473 U.S. at 188-89, 191. Because the extent of allowable development of the owners' land was uncertain, the takings claim was found to be unripe. *Id.* at 193-94. Similarly, the property owners in *MacDonald* alleged a taking arising from the denial of a subdivision development plan. 477 U.S. at 342-43. This Court again applied the finality doctrine to determine that the case was not ripe because *the planning agency might still approve some economically viable development of the owners' property. Id.* at 352.

The purpose of the "final decision" requirement reflects this Court's concern--evident in the cases that shaped the doctrine--with establishing the extent to which governmental regulation interferes with a citizen's right to build on her own land. This concern is consistent with this Court's

> frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, ***to leave his property economically idle***, he has suffered a taking.

Lucas v. South Carolina Coastal Council, 505 U.S. at 1019 (emphasis in original; emphasis added).

The decision below displaces the ripeness doctrine from the context of an inquiry into whether development of the owner's land has been prohibited, and converts it into a requirement resembling administrative exhaustion.[17] The presence or absence of a market for

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[17] "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy." *Williamson County*, 473 U.S. at 193. In the proceedings below both the District Court and the Court of Appeals expressly regarded the TDR program as an "avenue of relief" or "remedy" for TRPA's denial of all beneficial use of Mrs. Suitum's land (App. 150, (continued...)

TRPA's arbitrarily created, intangible entitlements has no bearing whatsoever on whether the agency has reached a final decision denying Mrs. Suitum's application to build on her land. That use of her real property--*which has heretofore been the only use relevant to the finality inquiry*--has been completely foreclosed.

One curious passage in the decision below seems to acknowledge that "use of property" and "feasible development" are synonymous for purposes of ripeness:

> Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of *permitted development*."

Suitum, App. 161 (citation omitted; emphasis added). However, it is undisputed that Mrs. Suitum's right to develop her land has been permanently extinguished. 1993 Order, App. 88. Thus, the only plausible interpretation of the above-quoted passage is that the Ninth Circuit equates *Mrs. Suitum's* right to build on her land with TRPA's permission for *any third party* in the Lake Tahoe region to develop his or her property. It is true that TRPA has not reached a final decision regarding whether someone else will be allowed to build *instead of Mrs. Suitum*. But this Court's ripeness formulation requires certainty as to the application of regulations "to ***the particular land in question***." *Williamson County*, 473 U.S. at 191 (emphasis added).

Development of *someone else's* property is not a "use" of Mrs. Suitum's parcel. Such a fundamental misinterpretation of this Court's precedents defeats the underlying rationale of the ripeness doctrine: to determine with certainty "the type and intensity of ***development*** legally permitted ***on the subject property***." *MacDonald*, 477 U.S. at 348 (emphasis added).

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[17] (...continued)
152, 160), suggesting that participating in the program is a form of administrative exhaustion. However, as this Court has often observed, "there is no requirement that a plaintiff exhaust administrative remedies before bringing a Sec. 1983 action." *Id.* at 192 (citing *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)).

B. TRPA Has Unequivocally Deprived Mrs. Suitum of the Right to Build a Home on Her Land

The "final decision" branch of this Court's ripeness doctrine is intended to ensure *certainty* concerning the application of a regulation to the owner's land. *See, e.g.*, William G. Asimakis, Jr., Note, *Electro-Tech v. H. F. Campbell Co.: The Breadth of the Taking Clause as a Conduit to Section 1983*, 1990 DET. C.L. REV. 797, 829 ("[t]he finality requirement of *Williamson County Regional Planning Commission v. Hamilton Bank* was created to dispel any speculation as to what extent the land-use restriction has affected the property owner's reasonably economical use of his land").

The impact of the regulation at issue in *Williamson County* was speculative because the planning agency had denied the owner's development plan based on eight specific objections--at least five of which this Court theorized could have been resolved by obtaining appropriate variances. 473 U.S. at 188. Because no variances were sought, "it was not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance." *Id.* at 191. No comparable uncertainty exists in the case at bar; TRPA's ruling has denied Mrs. Suitum the right to build *any* permanent structure on her land, and no variance, waiver, or other exception to this ruling is possible under the Code.

1. TRPA Has Reached a Final Determination That No Development Whatsoever Will Be Permitted on Mrs. Suitum's Land

As the Ninth Circuit acknowledged in the decision below, there is no uncertainty in this case concerning TRPA's prohibition of any productive development of Mrs. Suitum's land, *Suitum*, App. 158. The only source of administrative relief from TRPA's determination that Mrs. Suitum can make no beneficial use of her property is by an appeal to the agency's governing board. 1987 Plan, App. 33-34. Mrs. Suitum filed such an appeal, which was denied. 1993 Order, App. 87 n.3. Under these circumstances, there is *no remaining uncertainty* concerning the impact of TRPA's regulations on Mrs. Suitum's land that could be resolved by forcing Mrs. Suitum to find a buyer for TRPA's credits.

2. TRPA Has Specified with Precision the Administrative Credits It Will Allow Mrs. Suitum to Market

Marketing TRPA's credits is clearly not a "use" of Mrs. Suitum's land within the meaning of *Williamson County*. Even if participating in the TDR process *were* such a use, however, the nature and extent of this process is already known with certainty. Under TRPA's Code of Ordinances, Mrs. Suitum is allowed to market a "Land Coverage" credit for 183 square feet of impervious coverage;[18] four "Residential Development Rights," including "bonus" credits;[19] and one "Residential Allocation."[20] These credits are precisely specified and defined in the Code. Mrs. Suitum's authority to market them to a qualified buyer is not a matter of discretion on TRPA's part, but is established by the agency's prior decision categorically depriving Mrs. Suitum of the right to build on her land. Actually marketing or attempting to market the credits will add nothing to the certainty with which TRPA's regulations have been applied to Mrs. Suitum.

3. TRPA's Only Remaining Function Is to Confirm That Any Buyer of the Administrative Credits Owns Property That Is "Eligible" to Have Its Development Restrictions Relaxed

The decision below repeatedly requires Mrs. Suitum to *"apply"* to TRPA to participate in the TDR program. Such an application, however, would serve no purpose with regard to establishing whether TRPA had reached a final decision on the application of its regulations to Mrs. Suitum's land.

Applying for TRPA's approval of the marketing of administrative credits does not entail any discretionary determination on the part of the agency. The application that must be submitted is a form confirming that the property of any designated purchaser is

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[18] TRPA Code § 20.3.A, App. 45; § 20.3.C(2)(c), App. 54-55.

[19] TRPA Code § 34.2, App. 69; § 35.2.D, App. 111-12.

[20] TRPA Code § 34.3, App. 70.

"eligibile" to have its development restrictions relaxed. *See* Transfer Application, App. 118. This administrative function has no relevance whatsoever to TRPA's prohibition of all development on Mrs. Suitum's land, which constitutes a final decision within the meaning of *Williamson County's* ripeness doctrine.

4. Participating in the TDR Scheme Is Not Comparable to Applying for a Variance from the Application of TRPA's Regulations

This Court in *Williamson County* discussed the need to apply for any available variances that might allow development of the owner's property in order to satisfy the finality doctrine. 473 U.S. at 187-88. The significance of the availability of a variance is that it injects uncertainty into the inquiry concerning the type and intensity of development that will be permitted *on the owner's land*. *Id.* at 188 (variances "would have allowed [plaintiff] to develop the property"). So long as a property owner does not apply for an available variance this uncertainty remains unresolved. Under these circumstances reviewing courts are faced with the dilemma of being unable to determine "how far the regulation goes." *MacDonald*, 447 U.S. at 348. In the case at bar, however, it was conceded in the trial court proceedings that no variances or similar avenues of administrative relief were open to Mrs. Suitum. App. 88, 150.

The Ninth Circuit's equation of TRPA's marketable credits with the availability of variances is inexplicable except as further evidence that the court below regarded Mrs. Suitum's ownership rights as indistinguishable from those of any other property owner in the region:

> Although in the more typical scenario a plaintiff may face a municipal planning board which reviews modified development plans or requests for variances, here, the TDR program effects the same purpose: facilitating alternative uses of the property. ... That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.

Suitum, App. 161 (emphasis in original).

The only sense in which TRPA's administrative credits are comparable to variances is that, if successfully marketed, they would authorize *some third party* to exceed TRPA's regulatory restrictions on the development of his or her land. Once again, the court below seems to say that Mrs. Suitum's takings claim is not ripe because TRPA has not decided whether *someone else* will be allowed to build.

The TDR program does not disturb the finality of TRPA's decision denying all beneficial use of Mrs. Suitum's land. Because a sale of TRPA's credits cannot be finalized until the seller records a deed restriction or covenant permanently forfeiting her development rights, it is not possible that participating in the TDR program could "unring the bell" and allow Mrs. Suitum to make any use of her property. Likening this process to the application for a variance which might allow Mrs. Suitum to engage in some productive use of her land is an exercise in sheer fantasy.

C. TRPA's Marketable Credits Are Not a Substitute for Mrs. Suitum's Right to Build a Home on Her Land

The most fundamental reason that the sale of TRPA's marketable credits cannot be regarded as a "use" of Mrs. Suitum's property is that they *are not her property*. The administrative credits are in no sense a strand in the bundle of rights constituting Mrs. Suitum's ownership of her Mill Creek Estates lot, nor are they a substitute for those rights. Instead, the credits are arbitrary administrative creations embodying TRPA's *restriction* of private ownership rights.

The dominant paradigm of property ownership is that of a "bundle of rights" defining the relationship of the owner to the thing owned. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982); *United States v. General Motors Corporation*, 323 U.S. 373, 378 (1945). *See* Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 69 (Pennock & Chapman, eds., 1980). Among the individual strands of this bundle that have been identified and protected by this Court are the rights of possession (*United States v. Pewee Coal Co.*, 341 U.S. 114, 117 (1951)), exclusion (*Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)), devise (*Hodel v. Irving*, 481 U.S. 704, 716 (1987)), and residential use

(*Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987)).

Under certain circumstances the individual strands in an owner's bundle of rights may be severable and individually alienable. *See, e.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 412 (1922). However, even a cursory examination of the nature of TRPA's marketable credits reveals that these administrative creations correspond to no inherent attribute of Mrs. Suitum's ownership of her land. Indeed, they are administrative devices conceived and implemented to *restrict* her rights of ownership.

Of the three types of credits the court below requires Mrs. Suitum to market, one--a device to limit the amount of annual residential construction in the region--is distributed as a prize in a lottery.[21] Before Mrs. Suitum would even be in a position to market a Residential Allocation, she must first win the drawing by which these Allocations are distributed. The odds of winning an allotment at the 1993 Washoe County drawing were estimated by TRPA's expert at 6 chances in 400 based on the number of unbuildable parcels in the county, or about 1 chance in 5 based on the number of entries. Scholley Aff., App. 146-47. Obviously, any value commanded by a Residential Allocation would be attributable entirely to TRPA's restriction of the annual supply, the number of lots on which TRPA would allow residential construction to occur, and Mrs. Suitum's luck, rather than to any attributes inherent in her ownership of the Mill Creek Estates property.

The second type of marketable credit, a device to limit total residential development in the region, is a mere administrative contrivance, created and multiplied entirely at TRPA's discretion.[22] As the owner of property within a designated Stream Environment Zone, Mrs. Suitum qualifies for an entitlement to market three

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[21] "Residential Allocations," Barnett Aff., App. 99. Although Mrs. Suitum obtained a Residential Allocation in 1989 as the first step in applying to build her retirement home, this credit expired more than six years ago. Scholley Aff., App. 146.

[22] "Residential Development Rights" (RDRs), TRPA Code § 34.2, App. 69-70; Chap. 35, App. 109.

"bonus" RDRs.[23] These credits are part of a pool of 1,600 such units TRPA created out of thin air,[24] as a convenient way to implement its policies of restricting overall residential development. Scholley Aff., App. 147. The code does not specify why the number of RDRs awarded to Mrs. Suitum should be 3 instead of 2, or 12; the number of units is wholly arbitrary, bearing no inherent relationship to Mrs. Suitum's property or to her right to develop it.

The third credit Mrs. Suitum is required to market is a device to help TRPA implement its policy of limiting the placement of impervious ground coverage in the Lake Tahoe area.[25] If marketed, this credit would convey to its hypothetical buyer a dispensation allowing him or her to lay down additional impervious coverage equal to 1% of the area of Mrs. Suitum's lot--183 square feet.[26] Thus, this credit amounts to a marketable coupon authorizing a third party to, in effect, add a 12' x 15' bedroom to her home. Such authorization obviously originates entirely in TRPA's willingness to waive its restrictions on other people's property, not in any plausible strand of the bundle of rights inhering in Mrs. Suitum's ownership of her subdivision lot.

A cornerstone of any meaningful regime of private property is the recognition that the right to use property is an inherent attribute of ownership. *See, e.g.*, Robert Nozick, *Anarchy, State, and Utopia* 171 (1974) ("[t]he central core of the notion of a property right in X ... is the right to determine what shall be done with X"); *United States v. Causby,* 328 U.S. 256, 261 (1946). If this recognition is denied, then the ability to use property is no more than a government privilege or entitlement. Property ownership without the right of use would be an empty formalism, incapable of performing its crucial

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[23] Barnett Aff., App. 98.

[24] TRPA Code § 35.2.A, App. 109.

[25] "Land Coverage," TRPA Code §§ 20.3-20.4, App. 45-68.

[26] Barnett Aff., App. 96-97.

social function of providing a bulwark of personal autonomy against the encroachments of an aggressive, overreaching state.[27]

The essence of TRPA's marketable credits is that they authorize *their purchasers* to engage in more extensive development of their property than TRPA would otherwise allow. But clearly, such authority is not Mrs. Suitum's to grant. Whatever development rights the buyers of TRPA's credits possess stem from their ownership of their own land, land that Mrs. Suitum does *not* own. The authority for a third party to exceed the regulatory restrictions imposed by TRPA is patently not an element in the bundle of rights comprising Mrs. Suitum's ownership of property, and the opportunity to sell such an authorization therefore cannot logically be construed as a "use" of her property.

II

THE TDR SCHEME IS A SALE OF VARIANCES TO THIRD PARTIES, NOT A TRANSFER OF ANYONE'S DEVELOPMENT RIGHTS

In the decision below, the Ninth Circuit found that Mrs. Suitum could not know the extent of TRPA's restriction of the use of her land "[w]ithout attempting to transfer the rights she currently possesses." *Suitum*, App. 161. This statement betrays a fundamental misunderstanding of TRPA's "transfer of development" program.

The right to develop one's land, an essential strand in the bundle of rights comprising ownership of real property, must not be confused with the marketable credits TRPA has created. In their conception and implementation, these credits originate as *restrictions* on the right to develop one's own property. When marketed, they represent *variances* from restrictions on development of the purchaser's land.

As has been noted in the literature, the term "transfer of development rights"

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[27] *See* Friedrich A. Hayek, *The Road to Serfdom*, 103-04 (1944) (system of private property rights assures "that nobody has complete power over us, that we as individuals can decide what to do with ourselves").

> misrepresents the nature of the transaction. It is not so much the development right that is being transferred, but rather the development restriction that is removed from the transferee parcel and placed onto the transferor parcel.

Michael D. Struger, *TDRs: Robbing Peter to Pay Paul*, 62 U. DET. L. REV. 633, 643 (1985). Thus, the fact that Mrs. Suitum has not attempted to sell a variance (in the form of a marketable credit) to another property owner does not mean that she retains any untapped viable use of her own property--she doesn't. Mrs. Suitum's right to build on her land has been totally and permanently extinguished by the application of TRPA's regulations, leaving her with no development rights to "transfer." 1993 Order, App. 88. Pursuing TRPA's marketing scheme to its conclusion *cannot* result in a transfer of Mrs. Suitum's development rights, but only in the sale of a variance from TRPA's restrictions on the buyers' property.

By its application of the same "command and control" regulatory regime that extinguished Mrs. Suitum's rights, TRPA has arbitrarily abridged the development rights of other owners of undeveloped land throughout the Lake Tahoe region, denying them the full exercise of the development rights inherent in the ownership of their property. The essence of the TDR scheme is that if Mrs. Suitum can find buyers for TRPA's credits, the agency will agree to relax its restrictions on the buyers' property--in effect selling a variance *to the buyer* for cash paid to Mrs. Suitum. Such a transaction, if one actually occurred, would transfer no rights; Mrs. Suitum's development rights are gone forever, while the buyers would merely be allowed to exercise their own rights to a greater extent than before.

Nothing about this trilateral variance-for-cash scheme can remotely be considered a "use" of Mrs. Suitum's lot. The TDR program is simply a mechanism for marketing indulgences which allow their buyers to exceed the limits TRPA has arbitrarily imposed on the development of their own land.

III

ANY VALUATION ISSUES RAISED BY THE TDR PROCESS CAN READILY BE RESOLVED AT TRIAL WITHOUT REQUIRING MRS. SUITUM TO ENGAGE IN A MARKET TRANSACTION

The decision below requires Mrs. Suitum to obtain TRPA's approval of a proposal to market the agency's administrative credits to *establish their value* before she can bring her takings claim to court. *Suitum*, App 163. This adds an unprecedented and unsound appendage to this Court's ripeness doctrine, which heretofore has required only certainty as to the limitations that will be placed on a plaintiff's right to develop her land.

TRPA's approval process has nothing to do with either the use of Mrs. Suitum's land or the value of the administrative credits she has been authorized to market. TRPA approves only the eligibility of the purchaser's property to make use of the variances the agency has authorized Mrs. Suitum to sell. Valuation of any property interests involved--either of Mrs. Suitum's land or of TRPA's marketable credits--can readily be determined through normal appraisal methods without engaging in an actual market transaction. Adding an "actual sale" requirement to the ripeness doctrine would--at best--needlessly delay access to the courts for property owners whose development rights have been extinguished by government action.

Of even greater concern, TRPA's program requires Mrs. Suitum to execute a deed restriction or covenant permanently waiving her right to develop or alter her property before she can sell any of the agency's credits. Forcing Mrs. Suitum to alienate her property interests before she can bring her case to court would deprive Mrs. Suitum of her due process remedy, might foreclose her claim altogether, and conflicts with the salutory policy of providing the government with an opportunity to rescind its regulatory restrictions, thereby incurring liability for only a temporary taking. *Lucas*, 505 U.S. at 1053 n.17; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

A. The Economic Impact of a Regulation Can Be Established by Ordinary Appraisal Methods Without Requiring an Owner to Alienate Her Property Interests

Although both TRPA and Mrs. Suitum submitted evidence to the District Court concerning the value of the agency's marketable credits, *Suitum*, App. 162, the trial court concluded that their value could not be determined without pursuing an actual market sale. 1994 Order, App. 153. The Ninth Circuit endorsed this error, apparently basing its holding on the assumption that the value of intangible assets cannot be determined by a court unless they are actually sold. *Suitum*, App. 163. This implicit assumption conflicts with the routine judicial practice of valuing assets--including property in inverse condemnation cases--by expert appraisal without the necessity of an actual sale.

Determining the value, if any, of TRPA's marketable credits is no different from determining the value of any other good or service. Such valuations are routinely performed in judicial proceedings without the benefit of an actual market transaction. *See, e.g., Florida East Coast Properties v. Metropolitan Dade County*, 472 F.2d 1108, 1110 (5th Cir. 1978) (trial court received expert testimony and appraisals of the economic impact of jail construction on the value of nearby residential property); *United States v. 42.13 Acres of Land*, 73 F.3d 953, 955 (9th Cir. 1996) (valuation of property taken by inverse condemnation "based on an appraisal completed by [plaintiff's] experts analyzing fair market value between a willing buyer and a willing seller").

In the proceedings below, TRPA proffered the opinion of its expert that the administrative credits the agency granted to Mrs. Suitum are worth "from $10,000 to $21,500 or more" without a Residential Allocation, and would be worth an additional $30,000 if Mrs. Suitum were the lucky winner of such an Allocation at a drawing. App. 162-63. Mrs. Suitum's witness estimated the market value of the same credits at $2,500 to $7,500 "under the best of

circumstances." Declaration of Paul Kaleta (Kaleta Decl.), App. 137.[28] Faced with conflicting evidence, the District Court needs only to fulfill its its normal fact-finding role and determine the most credible valuation at trial.

The holding below, that Mrs. Suitum must actually market TRPA's credits to establish their value and thus ripen her takings claim, has no basis in *Williamson County's* ripeness doctrine. The value of both Mrs. Suitum's land *and* TRPA's administrative credits could be fully determined at the time Mrs. Suitum filed her takings claim, without recourse to a third-party market transaction. By insisting that valuation must be established through market sales instead of expert appraisal, the decision below distorts *Williamson County* by adding an additional, unnecessary step that this Court has never required to establish a ripe takings claim.

That this is a pointless and unwarranted extension of the ripeness doctrine is illustrated by the conflicting treatment of this issue by the Seventh Circuit Court of Appeals. Faced with a takings challenge to a similar regulatory restriction, the Seventh Circuit has correctly held that ripeness does *not* require an owner to alienate his property interest in order to ripen his takings claim. In *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258 (7th Cir. 1995), the owner of a liquor license alleged that an ordinance restricting the transfer of such licenses in certain Chicago neighborhoods--nonrelatives could acquire no more than a 5% interest in each year--worked a regulatory taking. 55 F.3d at 260. The District Court dismissed the case as unripe "because Marusic has no immediate plan to sell the business." *Id.* The Court of Appeals reversed, expressly finding the case ripe under *Williamson County* even though the owner had not attempted to sell his license. *Id.* at 261. The court held that "the ordinance itself embodies a conclusive decision about transferability" that had immediate impact on the value of the business even though it was "an

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[28] This evidence was excluded by the trial court because Mrs. Suitum's witness was held to lack the necessary qualifications to offer expert testimony on valuation. *Suitum*, App. 162. However, the affadavit of TRPA's expert was admitted into evidence, confirming that there is no difficulty *in principle* in valuing the agency's credits. *Id.*, App. 162-63.

open question whether, and if so when, Marusic will try to sell the store." *Id.*

In the case at bar the provisions of the TRPA Code creating the TDR program similarly "embod[y] a conclusive decision about transferability." These provisions define with specificity the credits that Mrs. Suitum would be allowed to market and the qualifications of any potential recipients. Mrs. Suitum is no more required to sell these credits to ripen her claim than Mr. Marusic was required to sell his store before challenging the regulatory restrictions at issue.

B. Complying with the Ninth Circuit's "Actual Sale" Requirement Could Deprive Property Owners of Constitutionally Mandated Remedies and Deprive Public Agencies of Flexibility to Limit Their Liability for Damages

The decision below effectively requires Mrs. Suitum to divest herself permanently of the very rights she claims TRPA has unconstitutionally abridged, as a condition precedent to challenging the agency's abridgment of those rights.

Before TRPA can approve any application to sell the agency's administrative credits, Mrs. Suitum would be required to "permanently retire" her property from development.[29] Permanent retirement means formally renouncing her development rights:

> For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights from the parcel shall be recorded by the owner.[30]

As one of TRPA's experts puts it, "the parcel must be greenbelted by the recordation of an open space easement across the parcel." Affidavit of Stephen R. Johnson in Support of Motion for Summary

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[29] Barnett Aff., App. 99; TRPA Code § 34.2.B, App. 69; § 34.5.B(1), App. 73; § 34.5.H, App. 75.

[30] TRPA Code § 34.5.H(1), App. 75.

Judgement (Johnson Aff.), App. 130. The greenbelting must be complete "at the time of transfer."[31]

The complaint Mrs. Suitum filed with the District Court included a due process cause of action, seeking relief in the form of an order invalidating TRPA's application of its regulations to her property, and requiring the agency to permit her to proceed with the construction of her home. First Amended Complaint, ¶¶ 11-12, App. 16. However, if Mrs. Suitum complies with the Ninth Circuit's "actual sale" extension of the ripeness doctrine, this remedy would be foreclosed. Having executed a deed restriction or covenant permanently alienating her right to develop her Mill Creek Estates lot as the price of getting her takings claim into court, Mrs. Suitum would no longer have standing to assert her right to build her retirement home on her land.

In addition to the manifest injustice of this result, such a "Catch-22" ripeness requirement invites the argument that Mrs. Suitum's takings claim would be moot once she has permanently divested herself of the right to build on her land. Without owning land on which she could build, it would be difficult or impossible for Mrs. Suitum to invoke the jurisdiction of a court to hear her claim that her development rights had been "taken" by TRPA's regulations. U. S. Const. Art. III, § 2, cl. 1.

In the alternative, assuming that a plaintiff would *not* be barred from court after complying with the Ninth Circuit's "actual sale" requirement, such a process would conflict with the express policy of this Court of allowing agencies the option to *rescind* regulatory acts that are found to violate the Takings Clause, thereby limiting their liability for damages:

> Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation.

Lucas, 505 U.S. at 1053 n.17. The ability of the regulatory entity to opt to rescind an unconstitutional enactment is part of the legislative flexibility traditionally respected and fostered by this Court:

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[31] TRPA Code § 34.2.B, App. 69.

> Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 321.

The decision below, which would strip Mrs. Suitum of her property interests as a condition of granting her access to the courts, would also deprive TRPA of any option but payment of full compensation for a permanent taking if Mrs. Suitum's claim prevails. This is an unsound result from the perspective of either the parties or society as a whole, and conflicts with this Court's long-standing regulatory takings jurisprudence.

The Ninth Circuit's ruling that a property owner must alienate her property interest--without compensation from the government--before she can challenge the constitutionality of the government's actions depriving her of any use of that interest is wholly alien to this Court's regulatory takings jurisprudence. If TRPA wishes to require Mrs. Suitum to permanently deed over the development rights to her land, the proper course is for the agency to condemn the property and pay Mrs. Suitum just compensation. *See Pennsylvania Coal*, 260 U.S. at 413 (when regulatory diminution of an owner's property rights "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act").

A process that requires a landowner to formally renounce any beneficial use of her land cannot, in keeping with the ordinary meaning of the English language, be deemed a "use" of the property in question. Such a process is clearly not a use of Mrs. Suitum's land within the meaning of this Court's finality ripeness doctrine.

IV

IF THE OPPORTUNITY TO MARKET A PUBLIC AGENCY'S ADMINISTRATIVE CREDITS IS HELD TO CONSTITUTE A BENEFICIAL USE OF LAND, IT WOULD VITIATE THE CATEGORICAL TAKINGS DOCTRINE OF *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

In addition to conflicting with the language and rationale of *Williamson County's* ripeness doctrine, the decision below calls into question the viability of the substantive takings rule set forth by this Court in *Lucas v. South Carolina Coastal Council*, that the regulatory denial of all economically beneficial use of land is a *per se* violation of the Takings Clause. 505 U.S. at 1015. If TRPA can contrive a legally cognizable "use" of Mrs. Suitum's land by (in effect) printing coupons and requiring her to market them, the agency can just as reasonably claim that its *fiat* administrative credits constitute an economically viable use of her land under *Lucas*. Such a ruse--which could instantly be implemented by every land use regulatory board in the United States--would render this Court's categorical takings doctrine a nullity.

A. Under This Court's *Lucas* Decision, TRPA's Outright Prohibition of Any Economically Beneficial Development of Mrs. Suitum's Land Is a *Per Se* Regulatory Taking

In *Lucas*, this Court held that a regulation that deprives an owner of all economically productive use of her land is the equivalent, for Takings Clause analysis, of a forced physical occupation:

> We have ... described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. ... The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.

Lucas, 505 U.S. at 1016. The facts in *Lucas*, in which South Carolina's Beachfront Management Act prohibited David Lucas from

building a house on his residential lot in a fully developed subdivision, are almost eerily similar to those in the case at bar:

> The plaintiff [is] an individual who want[s] to build a house on [her] land. [Her] neighbors ha[ve] houses on their property, and the governing law at the time [she] purchased [her] lot did not bar such construction.

Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1425 (1993).

In determining whether a categorical taking had occurred, this Court in *Lucas* focused on the law's impact on the owner's options for making actual, physical use of the land being regulated. A *per se* regulatory taking was found to occur when

> regulations ... leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state.

Lucas, 505 U.S. at 1018. The essence of this inquiry is whether the owner can engage in any productive, beneficial activity *on his land:* "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, *to leave his property economically idle*, he has suffered a taking." 505 U.S. at 1019 (emphasis added).

Mrs. Suitum's case falls squarely within the *Lucas* category of *per se* Takings Clause violations. Because of TRPA's restrictions, she "may not develop or build on the parcel of land she owns." 1983 Order, App. 88. Even to participate in the TDR scheme, Mrs. Suitum must "permanently retire" her property from development.[32] In short, she can make no beneficial use of her land under any circumstances. By classifying Mrs. Suitum's subdivision lot as a Stream Environment Zone with an IPES rank of zero, TRPA rendered the property literally *useless*. This is identical to the effect of the Beachfront Management Act in prohibiting all new "occupiable improvements" on David Lucas' land. *Lucas*, 505 U.S. at 1009.

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[32] TRPA Code § 20.3.C(7)(a), App. 57; § 34.2.B, App. 69; § 34.5.A, B, H, App. 73, 75.

There is disagreement in the record below concerning Mrs. Suitum's remaining ability to engage in trivial, ancillary activities like setting a picnic table on her land.[33] There is no question, however, that she is barred from constructing a home on her residential homesite--Mrs. Suitum's expectation when she purchased the property, and the benefical use consistent with the character and zoning of the surrounding neighborhood. In *Lucas*, this Court recognized that building a home on one's own property is an "essential use of land." 505 U.S. at 1031. Although this insight has been disputed,[34] the right to use residential property for this purpose is one that has always been subject to special constitutional protection. *See Nollan v. California Coastal Commission*, 483 U.S. at 833 n.2. The obliteration of this right by TRPA's actions in this case would clearly fall within this Court's *per se* takings rule under *Lucas*.

B. If TRPA Can Render Mrs. Suitum's Takings Claim Unripe Under *Williamson County* by Creating Administrative Credits and Requiring Her to Market Them, It Can Just as Easily Evade This Court's Categorical Takings Rule Under *Lucas*

Almost as soon as the *Lucas* doctrine was announced, self-proclaimed regulatory activists began advocating TDR schemes as a means of evading the impact of this Court's ruling.[35] This campaign has come to fruition in the decision below, which would create such

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[33] *Compare* Scholley Aff. at ¶ 17, App. 149 (picnic table can be placed on SEZ property) *with* Kaleta Decl. at ¶ 5, App. 136 (no picnic table allowed).

[34] *See, e.g.*, Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. at 1424 (characterizing the residential use of residential subdivision lots as "dim-witted rather than 'essential'").

[35] *See, eg.*, Steven R. Levine, *Environmental Interest Groups and Land Regulation: Avoiding the Clutches of Lucas v. South Carolina Coastal Council*, 48 U. MIAMI L. REV. 1179, 1182 (1994) (advocating "expansive" land use regulations that employ a TDR scheme as an "administrative option" to render *Lucas* "inapplicable").

a gaping exception to *Lucas'* categorical takings rule as to render it virtually impossible for any property owner to state a takings claim under this standard.

If the opportunity to sell a zoning variance to another landowner is deemed a "use" of one's land for ripeness purposes, then no regulatory regime could be said to foreclose all beneficial use of any individual's land so long as the regulatory agency fabricates a system of marketable credits. Under the reasoning of the decision below, regulators could completely strip an owner of the right to make any use of her land whatsoever, yet evade *Lucas'* categorical takings rule by offering her, as a substitute for her development rights, a bundle of credits that might (or might not) be of some conceivable use to *other* owners.

The core doctrinal rationale of *Lucas* is that the complete extinguishment of an individual's right to make productive use of her land is, "from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017.[36] That comparison is especially apt in the case at bar, for TRPA's regulations allow Mrs. Suitum to make no more use of her land than if a company of troops had permanently encamped there. In the latter case, the government could not escape liability for a *per se* taking by simply handing Mrs. Suitum a book of coupons that might reduce the number of troops that could be quartered on *other* people's land. If a TDR program would not prevent Mrs. Suitum from bringing a ripe claim for a categorical *physical* taking, it should not be sufficient to bar a categorical takings claim based on the complete deprivation of her right to build on her land.

The essence of a categorical taking--whether by physical invasion or by denial of economically beneficial use of an owner's land--is the government's assertion of *dominion* over the land, to the exclusion of the otherwise legitimate preferences and expectations of the landowner. There is a qualitative difference between legitimate

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[36] *See also United States v. Causby*, 328 U.S. at 261 ("[If] respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.").

police power restrictions on property use and the unilateral assertion of complete governmental control over privately owned land. As this Court noted in *Loretto*, "[t]o require that the owner permit another to exercise complete dominion literally adds insult to injury." 458 U.S. at 436. No greater governmental intrusion is possible than when a public agency confiscates all meaningful decision-making authority over private land for its own purposes. For this reason, a regulatory action that completely divests an owner of any meaningful control over the use of her land has uniformly been held to comprise a categorical taking under the Fifth and Fourteenth Amendments, whether under the doctrine of *Loretto* or of *Lucas*.

The decision below, while ostensibly directed to the question of ripeness, is plainly at odds with this Court's *per se* regulatory takings doctrine. Participating in TRPA's marketable credit program is irrelevant to TRPA's assertion of complete dominion over Mrs. Suitum's property, and cannot be considered a residual "use" of her land *either* for purposes of establishing ripeness under *Williamson County* or for establishing *per se* takings liability under *Lucas*.

CONCLUSION

For all the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit in this matter should be REVERSED.

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Respectfully submitted,

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